Supreme Court, U.S.
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No. 98-1178

In The

Supreme Court of the United States

October Term, 1998

BOARD OF REGENTS OF THE
UNIVERSITY OF NEW MEXICO,

Petitioner,

v.

JOANNE MIGNEAULT,

Respondent,

and UNITED STATES OF AMERICA,

Intervenor Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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1998

QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, contains a clear abrogation of the States' Eleventh Amendment immunity from suit by individuals.

2. Whether the extension of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, to the States was a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment, aborgating the States' Eleventh Amendment immunity from suit by individuals.

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JURISDICTION

On January 20, 1999, the Board of Regents of the University of New Mexico filed their petition for writ of certiorari, appealing the judgment entered by the United States Court of Appeals for the Tenth Circuit on October 23, 1998. The Petitioner invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1), seeking review of the Tenth Circuit's opinion which largely affirmed that of the United States District Court for the District of New Mexico, both opinions being published at 158 F.3d 1131 and 973 F. Supp. 1295 respectively.

ARGUMENT

I.

The Petitioner has focused their argument on the contention that the Eleventh Amendment stands as a bar to the exercise of federal jurisdiction over Age Discrimination in Employment Act ("ADEA") claims. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* Their focus has been misdirected. As an overwhelming majority of the Circuit Courts have concluded, the ADEA unmistakably abrogated the Eleventh Amendment protection the Petitioner seeks. Those Courts have examined the text and legislative history behind the ADEA and drawn – as has this Court – the inevitable conclusion that the ADEA abrogated the relevant immunity and left the States and their agencies liable to suit in federal court. The Petitioner bases the argument on a horridly fractured opinion presently before this Court and one Circuit Court that disagreed with the clear weight of its sister circuits.

An argument based on such slender support should be, as it was in the Tenth Circuit, rejected by this Court and remanded for trial before the District Court.

A. The Age Discrimination in Employment Act Clearly Abrogated the Eleventh Amendment Immunity.

Congress acted to inhibit discrimination against the aged in our society. With observations that the aged were all too frequently subjected to irrational and unfair prejudices against their ability to fulfill their job duties, Congress acted to stop such discrimination. Congress did so by determining that some legitimate age-based criteria could be used, but that discrimination was pervasive, and therefore, more aggressive limitations were required. *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983) (discussing reports prepared prior to ADEA legislation). Congress' attack on this discrimination required employers, including the states, to determine that such discrimination was based on reasoned requirements and not concealed prejudices. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Ultimately, age is not a proxy for ability or competence, and the ADEA stands against employers' attempts to use age as a gauge. *Id.* at 611 ("The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.").

The function of the ADEA is not to outlaw reliance on age as a distinctive characteristic, it is to bar its use when other, non-age-based criteria serve. *Id.* As long ago as 1967, Congress recognized the dangers and the impact of unreasonable age-based discrimination. 29 U.S.C.

§ 621(a). Even though this Court has rejected age as a protected class, requiring closer scrutiny of official conduct, Congress remains free to determine that conduct is unreasonable – even if the conduct is not directed to a protected class – and to require that such conduct come to an end. *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 766 (7th Cir. 1998); *see also EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982). The States come equipped with no special license to be unreasonably or irrationally discriminatory against the aged.

Through its terms, the Eleventh Amendment withdraws jurisdiction from federal courts, when a suit is brought by an individual against a state. *See Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Though appearing broad, there are exceptions to the sovereign immunity recognized by this Court. Particularly, Congress may abrogate the states' Eleventh Amendment sovereign immunity pursuant to Section 5 of the Fourteenth Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); *see also* U.S. Const. amend. XIV, § 1.

In *Seminole Tribe*, this Court explained the two-part inquiry for determining whether Congress abrogated the states' sovereign immunity when enacting a particular

statute. *See Seminole Tribe*, 517 U.S. at 72-73. *Seminole Tribe* explained that, absent a state's waiver, states retain their sovereign immunity unless: (1) Congress unequivocally expressed its intent to abrogate the immunity; and (2) Congress acted pursuant to a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment. *Id.; see also Green v. Mansour*, 474 U.S. 64, 68 (1985). As discussed by the Court of Appeals' opinion in this matter, Congress easily met these two requirements. *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998).

B. Congress Unequivocally Expressed Its Intent to Abrogate the Eleventh Amendment Immunity.

As a virtual parade of Circuit Courts have held, the Eleventh Amendment immunity to suit can be, and was, waived by Congress in the ADEA. Those determinations were based on an examination of the text of the ADEA, and a review of the legislative history underpinning the amendments to the ADEA which made states liable. The Petitioner seeks sincerely to suggest to this Court that there is a meaningful split in the Circuits. While the Eleventh Circuit may be split, the same cannot truly be said of the remaining circuits. *See, e.g., Hurd v. Pittsburgh State Univ.*, 109 F.3d 1540, 1544 n. 3 (10th Cir. 1997) (holding that Congress clearly intended to abrogate state immunity for ADEA, relying on specific authorization for ADEA suits); *see also Keeton v. Univ. of Nev. Sys.*, 150 F.3d 1055, 1057 (9th Cir. 1998) ("We join the overwhelming majority of our sister circuits . . . "). When examining the language and text of the ADEA, those circuits have nearly unanimously stated, after applying this Court's guidance

from *Seminole Tribe*, that the ADEA unmistakably abrogated the Eleventh Amendment protection.

The evidence those Circuits rest upon is the congressional effort to make States and the federal government liable for official discrimination against the aged. In its 1974 amendments to the ADEA, Congress extended the coverage to States, thereby affording state employees increased protection from irrational discrimination. 29 U.S.C. § 630(b) and (f). When it did so, Congress incorporated the public employee's right to be free from irrational age discrimination with the standards previously adopted in the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 626(b). Congress did so in light of precedent from this Court recognizing that talismanic language was unnecessary, and that the only relevant requirement was that the intent of Congress be unequivocal in its textual expression. *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring); *Mansour*, 474 U.S. at 68; *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 (1991). Congress provided precisely that unmistakable intent when it amended the FLSA and, by incorporation, the ADEA.

Those amendments included defining an employer as "a State or political subdivision of a State and any agency or instrumentality of a State," and defining employees as "employees subject to the civil service laws of a State government." Fair Labor Standards Act Amendments of 1974 § 28, 88 Stat. 74(a)(4), (b)(2) (amending 29 U.S.C. § 630(b) and (f)). As if to refute the intimation that the state might only be liable for specific relief under the Act, the amendments further specified that employers would

be liable for legal and equitable relief. 29 U.S.C. § 626(b), (c).

Ultimately, the inquiry reduces to identify: whom it is that constitutes a proper defendent. The answer is clear: States and their arms are clearly identified as defendants to ADEA suits. As this Court stated in *Seminole Tribe*, "we think that the numerous references to the 'State' in the text *make it indubitable* that Congress intended through the Act to abrogate the States' sovereign immunity from suit." *Seminole Tribe*, 517 U.S. at 57 (emphasis in original); *see also Scott v. Univ. Of Miss.*, 148 F.3d 493, 499 n. 3 (5th Cir. 1998); *Davidson v. Board of Governors of State Colleges and Univs.*, 920 F.2d 441, 443 (7th Cir. 1990); *Hurd*, 109 F.3d at 1544 (Congress abrogated the states' Eleventh Amendment immunity in enacting the ADEA's 1974 amendments); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 701 (1st Cir. 1983) ("[T]he ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate the congressional will that Eleventh Amendment immunity be abrogated.").

In fact, a reasoned reliance on this Court's own precedent makes it clear that the intent to apply the ADEA against the states was clear. In *EEOC v. Wyoming*, this Court concluded that "[T]here is no doubt what the intent of Congress was: to extend the application of the ADEA to States." *Wyoming*, 460 U.S. at 243 n. 18. Eight years later, this Court reaffirmed that conclusion by stating that "[The] ADEA plainly covers all state employees, except those excluded by one of the exceptions." *Gregory v.*

Ashcroft, 501 U.S. 452, 467 (1991); *accord Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 695 (3rd Cir. 1996) ("The statute simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as 'employers.' "). The passage of time has produced no loss of precedential value to this Court's analysis of the question.

Apparently to counterbalance the weight of that precedent, the Petitioner forwards *Employees* as the substance of their claimed need for this Court's review. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973). This argument is rightfully discredited in the Tenth Circuit and a host of its sister circuits. *Goshtasby*, 141 F.3d at 766; *Migneault*, 158 F.3d 1131; *Hurd v. Pittsburg State Univ.*, 29 F.3d 564, 565 (10th Cir. 1994); *Reich v. State of New York*, 3 F.3d 581, 590-91 (2nd Cir. 1993); *Hale v. State of Arizona*, 993 F.3d 1387, 1391-92 (9th Cir. 1993); *Davidson v. Board of Governors of State Colleges & Univs. for W. Ill. Univ.*, 920 F.2d 441 (7th Cir. 1990). The principle underpinning this *Employees* argument is that, despite *Seminole Tribe's* doctrinal exposition, a specific, absolute statement referencing the Eleventh Amendment or sovereign immunity is required. *But see Dellmuth*, 491 U.S. at 233. This is simply inconsistent with *Seminole Tribe* – the text and structure of the statute need only "make[] it clear that the State is the [intended] defendant to the suit." *Seminole Tribe*, 517 U.S. at 57.

The Petitioner stands before this Court seeking to have this Court declare that, in making its intent express, Congress must waive the Eleventh Amendment immunity with talismanic precision. The argument has failed

before, with good reason then, as now. This court should apply its precedent, deny the Petition, and remand this matter for trial. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 452 (1976) (designation of States as defendants constitutes abrogation).

C. Congress Acted Pursuant to Clause Five of the Fourteenth Amendment When it Enacted and Amended the Age Discrimination in Employment Act.

The larger share of the Petitioner's claims regarding the ADEA go to whether the ADEA was enacted pursuant to Clause Five of the Fourteenth Amendment. In so arguing, the Petitioner seeks to invoke the second stage of the abrogation inquiry, a stage recently discussed by this Court in *City of Boerne. See Seminole Tribe,* 517 U.S. at 65-66; *City of Boerne v. Flores,* 117 S.Ct. 2157, 2163, 2172 (1997). The Petitioner would have this Court draw the dubious conclusion that, despite its effort to bar discrimination against the aged, the ADEA is little more than a mild exercise of the Commerce Clause. Such a conclusion is simply not supported by the legislative history surrounding the ADEA and its amendments. *See, e.g., Goshtasby,* 141 F.3d at 772; *Hurd,* 109 F.3d at 1546.

The ADEA grew from congressional concern abut irrational discrimination against the aged. *Hazen Paper Co.,* 507 U.S. at 610-11. The concern was that employers and supervisors, both public and private, might rely on "inaccurate and stigmatizing stereotypes" in making workplace decisions. *Id.* Congress examined age-based

discrimination in the workplace and found it to be common. This determination supported the creation of a narrowly tailored response that proportionally attacked the most pervasive forms of the discrimination. *See* 29 U.S.C. § 621(a). As codified in the ADEA, there were five categories of particularly offensive discrimination. *Id.* Only one of these referenced interstate commerce, and it did so in the context of the irrationality of the conduct. 29 U.S.C. § 621(a) ("the existence in industries affecting commerce, of *arbitrary discrimination in employment because of age,* burdens commerce and the free flow of goods in commerce.") (emphasis added).

Merely because the offensive conduct occurred in the work place does not convert it to an act exclusively reliant on Commerce Clause authority. *See, e.g., Wyoming,* 460 U.S. at 243. As this Court observed in *City of Boerne,* "[l]egislation which deters or remedies [Fourteenth Amendment] constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " *City of Boerne,* 117 S.Ct. at 2163 (*quoting Fitzpatrick,* 427 U.S. at 455). The Tenth Circuit reviewed the record evidence and concluded, properly, that Congress sought to bar irrational discrimination through application of the Equal Protection Clause to the States, an act well within congressional authority. *Migneault,* 158 F.3d at 1138.

Under *City of Boerne,* Congress must rely on reasonably congruent methods to resolve observed discrimination. *City of Boerne,* 117 S.Ct. at 2164 ("[t]here must be a congruence and proportionality between the injury to be

prevented or remedied and the means adopted to that end."). Typically, Congress should consider remedial measures "in light of the evil presented." *Id.* at 2169. Such a consideration is important because Congress is without authority to create substantive changes in constitutional rights through the Fourteenth Amendment. *Id.* at 2163-70. The congruency between the constitutional injury and the remedial effort is what makes an act remedial and not substantive, within the terms of section 5. U.S. Const. amend. 14 § 5; *City of Boerne*, 117 S.Ct. at 2164.

Congress is well within its powers to regulate conduct offensive to the Equal Protection Clause, such conduct engaged in by the States. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause further bars arbitrary discrimination by the States. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988). The prohibition on arbitrary discrimination, includes conduct discriminating on the basis of age. *Gregory v. Ashcroft*, 501 U.S. at 470; *see also Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (*per curiam*). Further, despite the Petitioner's intimation to the contrary, there is no requirement that age be a suspect or quasi-suspect classification to merit protection from arbitrariness through the Equal Protection Clause. *See City of Cleburne*, 473 U.S. at 446; *Migneault*, 158 F.3d at 1138 (*citing Goshtasby*, 141 F.3d at 771; *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997)). Finally, the authority flows from the interpretation this Court has given Section Five of the Fourteenth Amendment. *See*,

e.g., Ex parte Virginia, 100 U.S. 339, 345-46 (1879); *see also Katzenbach v. Morgan,* 384 U.S. 641, 650 (1966).

From *City of Boerne,* the Petitioner seeks to divine a rule that, when not specified, a congressional act relies on the Commerce Clause before any others. Specifically, for legislation to escape such a determination, the Petitioner suggests that Congress must explicitly inform the nation of a different, most substantial foundation. This is simply inconsistent with this court's precedent. *See United States v. Price,* 383 U.S. 787, 789 (1966); *Woods v. Cloyd W. Miller Co.,* 333 U.S. 138, 144 (1948); *see also EEOC v. Wyoming,* 460 U.S. at 243 n. 18 (Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection' "). The Petitioner makes this argument in reliance on its continuing misunderstanding of *City of Boerne* in a manner that includes a new-found holding that Congress must enact its findings cataloguing evidence of discrimination for its legislation to possess remedial status. There simply is no such holding within (or without) *City of Boerne.* Further, to implement such a requirement would be contrary to long-standing practices of this Court and inconsistent with the deference due to a coordinate branch of the government. *City of Boerne,* 117 S.Ct. at 2170 (*quoting Oregon v. Mitchell,* 400 U.S. 112, 207 (1970) (Harland, J.)) ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.' ").

As the Fifth, Sixth, Seventh, Ninth and Tenth Circuit Courts have held post-*City of Boerne,* the ADEA works to end a confined, but offensive, body of discriminatory conduct through the Fourteenth Amendment. *Scott,* 148

F.3d at 500-03 (5th Cir. 1998); *Coger v. Board of Regents of Tennessee*, 154 F.3d 296 (6th Cir. 1998); *Goshtasby*, 141 F.3d 761 (7th Cir. 1998); *Keeton*, 150 F.3d at 1057-58 (9th Cir. 1998); *Migneault*, 158 F.3d 1131 (10th Cir. 1998). Those Courts have held that the ADEA requires that age-based discrimination by employers be justified, if possible, by criteria other than that of age. In so doing, Congress adopted a limited tool for a limited task, creating a key distinction between the case at bar and that in *City of Boerne:* the breadth of the statute. While the statute struck down in *City of Boerne* imposed "the most demanding test known to constitutional law," the ADEA is a statute of clearly defined limits, designed to protect older citizens from arbitrary and capricious action by the state. *City of Boerne*, 117 S.Ct. at 2171; *Hazen Paper Co.*, 507 U.S. at 611; *Goshtasby*, 141 F.3d at 772.

The proportionality of the ADEA's attack on irrational discrimination against the aged is almost beyond dispute. 29 U.S.C. § 623(f). The Petitioner suggests – without support for the proposition – that the ADEA creates constitutional rights. The right at question is the right to be free from irrational discrimination on the basis of age; the ADEA does nothing more than declare a class of irrationality to be prohibited. *See Hazen Paper Co.*, 507 U.S. at 611; *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985) ("employers are to evaluate [older] employees . . . on their merits and not their age."). The burden on State governments to avoid reliance on age as a surrogate for other qualifications is minimal, as they need only avoid reliance on "inaccurate and stigmatizing stereotypes." *Hazen Paper Co.*, 507 U.S. at 611 (reliance on age-correlated factors is acceptable); *Wyoming*, 460 U.S. at 231.

As discussed above, each and every citizen is protected from irrational state actions by the Equal Protection Clause, and the ADEA incorporates that protection for aged employees. *Ramirez*, 715 F.2d at 699-700; *Elrod*, 674 F.2d at 604-05 (1974 amendments worked "to prohibit arbitrary discriminatory government conduct that is the very essence of the guarantee of equal protection of the laws of the Fourteenth Amendment"). Joanne Migneault is, and always has been, imbued with the constitutional right to be free of arbitrary government conduct relating to her public employment. The Petitioner has not sought to explain Jane Henney's discriminatory conduct in a manner inoffensive to the ADEA. This Honorable Court should remand this matter to the District of New Mexico, and order the matter set for trial.

CONCLUSION

Perhaps the most troubling aspect of the Petitioner's argument is the assertion that age discrimination at universities is unlikely because universities use a tenure system for members of the faculty. Joanne Migneault was not, is not, and, now, likely will never be, a member of the University of New Mexico's faculty: the position she applied for was secretarial. Even if Jane Henney had not discriminated on the basis of Ms. Migneault's age, the Respondent's position never had the protection of a tenure system. Discrimination against the aged comes in the form of refusal to hire, like the case at bar, and in far more invidious manners, and above all else, comes against those without the comfort of a tenured position. It is for the protection of those, without the security of

tenure, that Congress enacted the Age Discrimination in Employment Act. For that reason, and for those discussed above, the Respondent respectfully requests that this Court deny the petition for writ of certiorari and remand this matter for trial.

Respectfully submitted,

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